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IN THE

Supreme Court of the United States

October Term, 1967.

No. 1007

COE A. BOARDMAN and MARTHA E., his wife, and FRANK J. SMITH and THERESE E., his wife,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

The Petitioners are individuals, husbands and wives, hereinafter referred to as "Petitioners".

Petitioners respectfully pray that this Honorable Court may grant a writ of certiorari to the United States Court of Claims to review a judgment of that Court entered May 12, 1967, in which rehearing was denied October 13, 1967.

OPINIONS BELOW.

The Opinion of the Court of Claims dated May 12, 1967 is reported in 376 F. 2d 895 (Ct. Cl. 1967). It is fully set forth in an appendix to this petition. The opinion of the Trial Commissioner is unreported.

JURISDICTION.

(a) The judgment of the Court of Claims was entered on May 12, 1967.

(b) Pursuant to Rule 68 of the Court of Claims Petitioners filed a Motion for Rehearing on June 9, 1967. Such Motion was denied by the Court by way of Order dated October 13, 1967.

(c) Jurisdiction to consider this petition is conferred upon this Court by 28 U. S. C. §1255 (1), the petition being timely filed under the provisions of 28 U. S. C. §2101 (c).

QUESTION PRESENTED.

Was the Petitioners' cause of action for compensation for the taking of an avigation easement over their property by Respondent barred by the Statute of Limitations set forth in 28 U. S. C. §2501?

STATEMENT OF THE CASE.

The Petitioners, FRANK J. SMITH and COE A. BOARDMAN, prior to the filing of the petition in this matter had been engaged in the residential building development business for a number of years (N. T. 13).

Petitioners commenced suit against the Respondent on December 5, 1963 by filing a petition with the United States Court of Claims seeking damages for a taking of an avigation easement over the Petitioners' property located in Horsham Township without just compensation in violation of the Fifth Amendment of the United States Constitution.

The Respondent filed an answer to Petitioners' petition denying that a taking had occurred and averring that if a taking did occur it was barred by the six year Statute of Limitations provisions of 28 U. S. C. §2501.

The case was tried before the Honorable C. Murray Bernhardt, Commissioner of the United States Court of Claims on October 13th and 14th, 1965, at the United States Naval Air Station, Willow Grove, Pennsylvania.

At trial the Petitioners produced evidence that they had, for many years, been engaged in the construction of residential home developments in southeastern Pennsylvania and surrounding states (N. T. 13, 20, 21).

On June 13, 1955 the Petitioners purchased a tract of land consisting of 122.55 acres in Horsham Township, Montgomery County, Pennsylvania, which site was to be subdivided and used for residential home development. The tract of land is bounded by Keith Valley Road and Park Road and lies immediately north of the Willow Grove Naval Air Station (N. T. 13-14).

At the time of the acquisition Petitioner, Frank J. Smith and his agent, Paul Franz, were informed that the Air

Station was to be closed, and they had no knowledge that the Air Station was to be expanded (N. T. 18-19, 37-38).

It was established that Melvin Stackhouse, a lumberman, commencing in November of 1956 and continuing until August of 1957, had cut down the large trees on the subject property which enabled the Petitioners to prepare a preliminary subdivision plan for the development (N. T. 119-122).

From August, 1957 until 1960, the Petitioners did not actively pursue their development plans since they were engaged in other construction work in the State of New Jersey (N. T. 23-24). In 1958 the Respondent changed the flight pattern of its aircraft so as to bring such aircraft directly across Petitioners' property for the first time (N. T. 375, 379, 426).

Mr. Franz, in 1960, as real estate agent for the plaintiffs, was contacted by Donald Carlson who made an offer to purchase one of the lots in the proposed subdivision plan, and subsequently an agreement of sale with Mr. Carlson was concluded (N. T. 81).

As a result of this activity the Petitioners decided to proceed to develop the subject property, and engaged Charles E. Shoemaker, a Professional Engineer, to prepare a subdivision plan for the subject property for submission to the Horsham Township Planning Commission for approval (N. T. 27, 28, 103).

Commencing on August 3, 1960 and continuing until February 10, 1961, Mr. William Hower, of Charles Shoemaker's office, met with the said Planning Commission to resolve all of the technical engineering questions involved in the subdivision plan (N. T. 102-111).

During this same period of time Mr. Franz met with the Planning Commission seeking approval of the subdivision plan and it was at this time that the Petitioners learned that the Planning Commission was reluctant to approve a resi-

dential development located in close proximity to the Willow Grove Air Station for fear that the aircraft operating out of the base might possibly crash resulting in a major catastrophe (N. T. 83, 85).

The Petitioners, notwithstanding this fact, pursued adoption of their subdivision plan because in view of their experience it was clear that the subject area was otherwise physically excellent for development.

However, the Planning Commission would not approve the subdivision plan even though it fell clearly within the proper zoning classification, and met all of the Commission's engineering specifications (N. T. 85, 159).

Petitioner Smith then advised Mr. Franz at the time of the crash of the jet aircraft into the Bargain City Department Store at Horsham, Pennsylvania, on August 27, 1961 to abandon the subdivision plan since the action of the Planning Commission in rejecting the plan because of the risk involved with the jet aircraft rendered the property valueless for residential purposes (N. T. 86).

Benjamin Park, a member of the Planning Commission, stated unequivocally that the Commission rejected plaintiff's subdivision plan solely because of the risk involved to residents around the Air Station (N. T. 166).

As further evidence of the fact that up until 1961 the property was valuable for residential development, Felix Clauss, an experienced builder, testified that he acquired the tract of land immediately adjacent to the Petitioners' property for residential development, but abandoned said plans about the time that the air crash occurred in August of 1961 (N. T. 130, 140).

Harry Haeberle, an experienced real estate appraiser, testified on behalf of Petitioners that in his opinion the highest and best use of the subject property was for a residential community of homes ranging in price from $22,000. to $22,500. Mr. Haeberle further stated that prior to the taking

the value of the property was $437,400., and that immediately after the taking the property had been reduced in value to $175,400 (N. T. 188, 191, 193).

The Respondent introduced a number of witnesses whose testimony in many instances was cumulative, but in essence disclosed that jet aircraft started operating over the subject property in July, 1955, and that such aircraft created noise in taking off and landing over the subject property.

After the trial of the case before the Commissioner both parties filed Requested Findings of Fact and Briefs on the Law.

On July 13, 1966 the Commissioner filed his Report to the Court, setting forth findings of fact and recommended conclusions of law pursuant to Rule 57 (a).

Thereafter, Petitioners duly filed exceptions to the report of the Commissioner, which exceptions were argued before the Court en banc.

On May 12, 1967 the Court of Claims adopted the opinion, findings and recommendations of the Commissioner, with modifications, and entered judgment dismissing Petitioners' petition. *Coe A. Boardman, et al. v. United States,* 376 F. 2d 895 (Ct. Cl. 1967). The Court's holding was based upon its determination that Petitioners' Constitutional right to just compensation for the conceded "taking" of their property by Respondent was barred by the running of the Statute of Limitations set forth in 28 U. S. C. §2501. 379 F. 2d at 896-897, 900.

Petitioners, within the requisite time allowed by the Rules of Court, filed a Motion For Rehearing, but such Motion was denied by the Court en banc.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

A. The Test Applied By The Court Of Claims With Regard To The Time Of "Taking" Was Erroneous And In Direct Conflict With Prior Decisions Of Such Court And Of This Court.

It has been conceded by the Respondent and the Court below that a compensable "taking" occurred by reason of the flight of government aircraft over Petitioners' superadjacent airspace and below the lower limits of navigable airspace. *Coe A. Boardman, et al. v. United States,* 376 F. 2d 895 (Ct. Cl. 1967); Air Commerce Act of 1926, 49 U. S. C. §171, as amended by Civil Aeronautics Act of 1928, 49 U. S. C. §401.

Such a constitutional "taking" of an avigation easement over the Petitioners' subject property would entitle them to just compensation if their action has been brought within the period prescribed by 28 U. S. C. §2501. *United States v. Causby,* 328 U. S. 256 (1946); *Griggs v. Allegheny County,* 369 U. S. 84 (1962); *United States v. Dickinson,* 331 U. S. 745 (1947).

28 U. S. C. §2501 provides, inter alia as follows:

> "Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim accrues."

In holding that Petitioners' claim was barred by the foregoing Statute of Limitations the Court below stated:

> "We cannot say with any confidence at what precise point after the first arrival of jets at Willow Grove in July 1955 they reached the level of substantial inter-

ference, but it is clear that it was reached at least by the summer of 1956 when conditions prompted the convincing complaint by the proprietor of the Silver Arrow Day Camp, referred to above." 376 F. 2d at 900.

The government's contention, presumably accepted by the Court below, is that the date of taking could be any particular day between the time of the first arrival of jets at Willow Grove in July, 1955 and the summer of 1956 when enough jets flew enough times over the subject property at low enough altitudes so as to disturb the enjoyment of a user of that property. This is clearly not the test envisioned by the Supreme Court in the case of *United States v. Dickinson,* 331 U. S. 745 (1947), nor is it the test enunciated by the Court of Claims itself in *Klein v. United States,* 152 Ct. Cl. 221 (1961); *Davis v. United States,* 295 F. 2d 931 (1961), *Bacon v. United States,* 295 F. 2d 936 (Ct. Cl. 1961); and *Jensen v. United States,* 305 F. 2d 444 (Ct. Cl. 1962).

If the government's theory were adopted, it could escape liability in almost every case of alleged inverse condemnation. The government could assert, in actions brought by landowners immediately after the advent of jet aircraft and flights over their property, that no "taking" had occurred; merely a trespass. On the other hand, if the landowner waits until conditions become intolerable or obnoxious and only then institutes suit, the government could then argue that the same *initial* overflights were of such character as to constitute a "taking" as *opposed to a mere trespass.* Such a situation was never intended nor can it be permitted to exist.

See: *Batten v. United States,* 306 F. 2d 580 (10th Cir. 1962); *Bedford v. United States,* 192 U. S. 217 (1904).

In *United States v. 3276.21 Acres of Land,* 222 F. Supp. 887 (S. D. Cal. 1963), the Court commented as follows:

"In our case there was not a complete taking bit by bit or foot by foot of land as the trespasses of the United States continued. Undoubtedly, the first trespasses by single prop planes were so insignificant as to cause the land owner no concern whatsoever. Gradually the flights increased. Eventually, in August of 1955, the greatly accelerated number of flights by jets so interfered with the land, and became so oppressive that a *taking* was instituted or started. We term it an "incipient taking". Thus in our case, we had trespasses increasing bit by bit until the time the taking occurred. In the *Dickinson* case each foot of land was completely taken as the water rose and covered it.

We cannot escape the teaching of the cases that the government must pay in a condemnation case for property taken, but not for property damaged. Each trespass might be called damage to the property, but as set forth heretofore, the trespass did not become so extensive as to constitute an incipient taking until August of 1955. If each flight of a plane across the land owner's property below the public domain, and constituting merely a trespass gave rise to a cause of action, the situation that would result would be intolerable. The claims would flood the courts, the alleged damage would be in each instance almost impossible to ascertain."

* * *

"It would seem that the break line as to where compensable damage exists in either a case involving condemnation or inverse condemnation would be that time when the trespass flights became so intolerable, so oppressive and created such a substantial interference with the use of the property that they ceased to be a mere trespass and constituted a taking or incipient taking." 222 F. Supp. at 891. (Emphasis supplied.)

The touchstone of the Court's decision below should have been Justice Frankfurter's opinion in *Dickinson*, supra. Because his language is clear and unambiguous, to paraphrase it might be to dilute it. We, therefore, quote the same at length:

> "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time. *The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old and new niceties regarding 'cause of action'—when they are born, whether they proliferate and when they die.* We are not now called upon to decide whether in a situation like this a landowner might be allowed to bring suit as soon as inundation threatens. Assuming that such an action would be sustained, it is not a good enough reason why he must sue then or have from that moment, the statute of limitations run against him. If suit must be brought, lest he jeopardize his rights, as soon as his land is invaded, other contingencies would be running against him—for instance, the uncertainty of the damage and the risk of res judicata against recovering later for damage as yet uncertain. The source of the entire claim—the overflow due to rises in the level of the river—is not a single event; it is continuous. And as there is nothing in reason, so there is nothing in legal doctrine to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized. An owner of land flooded by the government would not unnaturally postpone bringing a suit against the government for the flooding until the consequences of inundation have so manifested themselves that a final account may be struck.

When dealing with a problem which arises under such diverse circumstances procedural rigidities should be avoided. All that we are here holding is that when the government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or premature litigation to ascertain the just compensation for what is really 'taken'." 331 U. S. at 748-749. (Emphasis supplied.) See also: *United States v. Martin*, 267 F. 2d 764 (10th Cir. 1959).

In *Dickinson*, supra, the government had built a dam and notified adjoining landowners, in 1936, that it intended to elevate the river level. The dam was impounded with water in October, 1936, but the river level was not raised until September, 1938. Plaintiffs instituted suit in 1943 and the government defended on the ground that plaintiffs' property had been continuously flooded since October, 1936, although it was not completely inundated until after September, 1938. Thus, the government argued, plaintiffs' action was barred by the applicable six year Statute of Limitations. The Supreme Court rejected the government's argument and affirmed judgments for the plaintiffs rendered by the trial court.

Justice Frankfurter, speaking for the Court, set forth the foregoing basic principles of law and equity that must govern every trier of fact who is presented with the question of the application of the statute of limitations in an inverse condemnation case.

He further commented as follows:

"The government could, of course, have taken appropriate proceedings to condemn as early as it chose both land and flowage easement. By such proceedings, it could have fixed the time when the property was 'taken'. The government chose not to do so. It left the

> taking to physical events, thereby putting on the owner the onus of determining the decisive moment in the process of acquisition by the United States when the fact of taking could not longer be in controversy." 331 U. S. at 747-748.

Accordingly, it must be recognized that the statute of limitations is not a club to be wielded by the government to punish one whose property it has taken and upon whom is cast the onerous task of subjectively determining at what point in time his inchoate claim for such wrongdoing has ripened into a sustainable cause of action. Rather, the limitation language of 28 U. S. C. §2501 was intended, and should be applied by the Court, as a bar to those actions based upon an allegation of inverse condemnation in which the quantum and character of interference from overflights was so severe at a particular time or for a particular period, more than six years prior to the institution of the action, as to make it clear to the injured party (and it is so proven by the government) that the subject property has been rendered valueless for the purpose for which it was intended to be used or had been used. Only if the statute of limitations is so applied is the Court aided by its application and is the injured party not deprived of a constitutional right which has already vested.

The test laid down in *Dickinson*, supra, represents a fine balance between objective and subjective considerations and elements, but is clear in intent: where the government chooses not to condemn property but, rather, to leave the "taking" to a series of physical events, the owner of the property, upon whom is cast the "onus of determining the decisive moment in the process of acquisition . . . when the fact of taking" can no longer be in controversy, ought not be penalized by a rigid application of the Statute of Limitations. *United States v. Dickinson*, supra at 747-748.

This well balanced test was initially applied by the Court of Claims in *Bacon v. United States,* 295 F. 2d 936 (Ct. Cl. 1961) and *Klein v. United States,* 152 Ct. Cl. 221 (1961).

In *Bacon,* supra, overflights of B-25 bombers began during World War II and jet aircraft were operational in 1948. Both flew below the lower limits of navigable airspace. The Court queried: when were the overflights so obnoxious as to become intolerable to plaintiffs? Although there was *no evidence of any significant change in flight pattern* the Court held that a "taking" did not occur until 1954 when louder jets were introduced, one of which crashed into the subject property in 1955.

In *Klein,* supra, plaintiffs continuously protested overflights which began in 1947. Originally, the Court of Claims found that plaintiff's action was barred by the limitation provision of 28 U. S. C. §2501, but upon rehearing determined that it had not correctly applied the *Dickinson* test and reversed, holding that:

> "Plaintiffs had been uneasy about the flight of the planes over their property and suffered considerable inconvenience from the noise and vibration, but until about the first of September 1954 they had not found the conditions intolerable."

One of the essential, compelling facts upon which the Court there relied was a change in flight pattern which brought the planes directly over the subject property. The change, the Court stated, was not one which plaintiffs had reason to anticipate. Plaintiffs' cause of action, therefore, had not fully accrued and did not fully accrue until such conditions had come to pass or the extent of the use and the consequent interference with such use and enjoyment of the property was fully known or ascertainable.

Applying the tests set forth in *Bacon* and *Klein* it is submitted that Petitioners' action herein was timely.

Initially, there was increased flight activity after 1957 which was not to be anticipated (witness the base commander's letter to Mr. Barmat, Exhibit D-20, N. T. 322).

Secondly, the introduction of F-1 jets in 1959 meant a significant change in the noise factor. 376 F. 2d at 897.

Thirdly, the very important change in flight pattern from a left to right hand pattern which for the very first time brought aircraft directly over the middle of Petitioners' property (N. T. 375, 379, 426). *This change occurred in 1958* because of the recognition of a safety factor in the congested residential areas to the east of Petitioners' property.

Fourthly, the introduction of night flying in 1960 (N. T. 385, 393).

Finally, the fatal crash which took place on August 27, 1961 adjacent to Petitioners' property. 376 F. 2d at 898.

Thus, in 1958 a hitherto unexpected and unanticipated change occurred which for the first time subjected Petitioners' entire property to overflights below the lower limits of navigable airspace.

Under the theory of *Klein v. United States,* supra, *Davis v. United States,* supra, and *Avery v. United States,* 330 F. 2d 640 (Ct. Cl. 1964) it is submitted that the foregoing unanticipated acts by the government cumulatively created a surcharge upon or "taking" of Petitioners' property.

An even-handed application of the tests laid down in *Dickinson,* supra, and followed in *Klein* and *Davis,* supra, requires at the very least some recognition of the fact that the flight pattern was changed and that such change was not anticipated by Petitioners. Certainly, the Court below was not required to reach the same conclusions or draw the same inferences as the Trial Commissioner, and could have analyzed and disposed of such facts in accordance with their judicial power to do so. *Ball v. Paramount Pictures,* 169 F. 2d 317 (3rd Cir. 1948).

But, neither these facts nor the conclusions contended for by Petitioners—facts which were so important in *Klein* and conclusions which were considered critical in *Davis* and *Avery,* supra—were even considered by the Court below.

Such a failure to apply the same standards to the instant case that had been previously applied to similar claims may not rise to the status of a violation of Petitioners' right to equal protection of the law or due process, but does evidence a disposition on the part of the Court below to accept without question or proper review the facts, conclusions and tests of the Trial Commissioner. Cf., *Acme Process Equipment Co. v. United States,* 347 F. 2d 538 (Ct. Cl. 1965), Footnote 2 at p. 542.

As Judge Whitaker aptly pointed out in his concurring opinion in *Davis v. United States,* 295 F. 2d 931 (Ct. Cl. 1961), the teaching of the *Dickinson* case compels the conclusion that plaintiffs are entitled to wait until they can ascertain the full extent to which defendant's flights would interfere with the use and enjoyment of their property and only then sue for the entire reduction in value at one time. A continuous course of conduct requires only one action. *Davis v. United States,* supra at 935.

The decision of this Court in *Jensen v. United States,* 305 F. 2d 444 (Ct. Cl. 1962), seems to have sought to clarify some of the objective standards left open in *Dickinson.* But, while not forsaking the subjective reactions of the Petitioners, even a strict application of the objective standards enunciated in *Jensen* support Petitioners' contention that the instant action occurred no earlier than December 5, 1957.

What was said by the Court of Claims in *Jensen,* supra, is pertinent here:

> "There is, unfortunately, no simple litmus that for discovering in all cases when an avigation easement is first taken by over flights. Some annoyance must be

> borne without compensation (Citing Cases). The point when that state is passed depends on a particularized judgment evaluating such factors as the frequency and level of the flights; the type of planes; the accompanying effects, such as noise or falling objects; the uses of the property; the effect on values; the reasonable reactions of the humans below; and the impact upon animals and vegetable life. The Government's argument that the taking in this case occurred before February 1952 (i.e. prior to six years before the filing of the petitions) fails because it overstresses some of these elements and neglects others which are critical." 305 F. 2d at 447.

The Government has in this case also overstressed some elements and neglected others which are critical. But, what is most disturbing is that the Court below should have fallen prey to such an obvious bootstrap tactic.

The test propounded by the respondent and obviously accepted by the Court below—to wit: during what point of time did enough jets fly enough times over the subject property at low enough altitudes so as to disturb a user of such property to a greater extent than they previously had done (376 F. 2d at 899)—all but obliterates the underlying intent and purpose of 28 U. S. C. §2501 as analyzed and discussed by this Court in *Dickinson,* supra. It completely discards the subjective considerations deemed so necessary to obtain a just result in *Bacon* and *Klein,* supra. It conflicts directly with decisions rendered, based upon the well established rationale of *Dickinson,* by lower courts of concurrent jurisdiction. See: *United States v. 3276.21 Acres of Land,* 222 F. Supp. 887 (S. D. Cal. 1963). It permits the use of the objective standards set forth in *Jensen,* supra, to be used as tools for the rationalization of facts and the justification for improper conclusions based upon such

facts. It elevates to an unwarranted and absurd position the procedural rigidities sought to be avoided by Justice Frankfurter and would destroy Constitutional rights in Fifth Amendment claims which are fresh and can be proven with sufficient accuracy. It distorts the entire purpose of 28 U. S. C. §2501 which was to aid the Courts by bringing before them fresh claims supported by recent factual circumstances. *Friedman v. United States,* 310 F. 2d 381, 401 (Ct. Cl. 1962); *Gordon v. United States,* 140 F. Supp. 263, 265 (Ct. Cl. 1956).

Moreover, throughout the thread of the opinion below is a clear indication that the burden of persuasion with respect to the time of the accrual of the Petitioners' cause of action and the facts necessary to such determination was improperly cast upon the Petitioners.

The burden of pleading and "persuasively" proving that Petitioners' conceded cause of action was barred by the limitation language of 28 U. S. C. §2501 should have been upon the Respondent, who affirmatively relied upon such statute. *Todd v. United States,* 292 F. 2d 841 (Ct. Cl. 1961); *Madigan v. United States,* 142 Ct. Cl. 641 (1958).

The fact that Respondent failed to present evidence sufficient to satisfy its burden of persuasion with respect to the time at which the Petitioners' claim accrued is manifested by the Court's admission that it cannot say with any confidence when the "taking" occurred. 376 F. 2d at 900.

Furthermore, in its attempt to rationalize the facts in order to fit them to the classical test enunciated in *Dickinson* and fashioned with preciseness and justice in *Bacon, Klein* and *Jensen* the Court below has arrived at a hybrid test which provides neither the Constitutional fairness of Justice Frankfurter and the essential subjectivity of *Bacon* and *Klein,* nor the valid and helpful objectivity of *Jensen,* supra.

The major areas of reliance upon facts by the Trial Com-

missioner and the Court are indicative of the validity of the foregoing analysis.

The testimony of Mr. Barmat, proprietor of the day camp adjacent to Petitioners' property, whose "convincing complaint" admittedly influenced the Court's decision, rendered such aforesaid complaint meaningless. The "complaint" was not made until after the summer of 1956, after Barmat had entered into a five year lease for the premises on which he remained until 1961 when the lease ran out and he did not renew it because he "just didn't want to remain there" (N. T. 320, 326).

The testimony of Mr. Barmat did not support Respondent's contention that by the summer of 1956 conditions had become intolerable and that the level of substantial interference had been reached. He admitted that in 1956 and 1957 there "wasn't much air traffic" during weekdays (N. T. 338); that subsequent to 1957 there was an increase in the number and intensity of the overflights (N. T. 333); that they became worse toward 1961 (N. T. 333, 337); and that the transition to jets at the air base was only "largely completed" in the summer of 1956 (N. T. 323).

If the conditions of which he complained existed in the summer of 1956, why did Mr. Barmat undertake a *five year* lease of the property in 1957?

If the transition to jets had not been completed in the summer of 1956, if there "wasn't much air traffic" then, and there was an increase in the number and intensity of overflights after 1957, how can the summer of 1956 possibly be the date of "taking"?

The Commissioner, and the Court below, have stated that they cannot "say with any confidence" when the conceded taking occurred. Was it not the duty of the Respondent to supply such confidence by the presentation of persuasive evidence?

Moreover, the Court below could have accepted the bare

findings of fact made by the Commissioner without also accepting and adopting his inferences and conclusions. See: *Ball v. Paramount Pictures, et al.*, 169 F. 2d 317 (3rd Cir. 1948). In accepting such conclusions the Court was required so to rationalize the facts as to distort the test which should have been applied in order to reach a just conclusion.

That this is so is amply demonstrated by reference to facts relied upon by the Court below as part of the basis for its decision.

With respect to the decision of the F.H.A. not to offer financing for residential development, the Commissioner himself remarked that this was consistent with the previously announced policy of the F.H.A. in 1954 to systematically reject applications for any property proximate to an airport, from which, at any time in the future, overflights might emanate (N. T. 270-273). The fact that it was because of this previously written policy, and *not* because of any demonstrably dangerous condition at the subject air base, that prompted the F.H.A. decision was confirmed categorically by *Respondent's witness* Gabler (N. T. 270-273).

In addition, the statement by the Court below that there was no cause and effect relationship between the crash in 1961 and the rejection of plaintiffs' sub-division plan by the township Planning Commission is refuted by the testimony of *Respondent's witness* Park (N. T. 163-166).

Mr. Park, in answer to direct questions put to him by the Commissioner stated without contradiction:

(1) That the Planning Commission did not formulate a definite policy with regard to sub-division in the area in question until after the 1961 crash (N. T. 164);

(2) That they were prompted to formulate such policy *solely* by reason of the crash (N. T. 166) when they real-

ized that "the statement 'It can't happen here' did happen once"; and

(3) That it was more of a safety factor than a noise factor which prompted their decision to forbid residential development in the area (N. T. 164).

Uncontradicted evidence clearly demonstrated that from 1960 until the rejection of their plan in 1962 the plaintiffs actively pursued their sub-division application (N. T. 103, 104, 107, 108, 109, 159, 85).

It was, as Mr. Park admitted, the *fact of failure* and not the mere fear of failure which prompted the Commissioner's decision. Out of the 17 crashes referred to by the Commissioner, 15 occurred *on the base itself*, and the other two nowhere near plaintiffs' property. See: Exhibit D-29.

It is inconceivable that the Commissioner, and Court below, could justifiably conclude that the risk of crashes *on the subject property* was appreciable before the change in the flight pattern in 1958 (N. T. 426) and the crash in 1961 or that there was no causal relationship between the aforesaid crash and the act of the Planning Commission. Such a conclusion flies in the face of the evidence.

The opinion of the Court below concedes that the *risk* of crashes alone does not trigger a "taking" although it may constitute a trespass. But, the *fact* of a crash, in light of increased air traffic, a significant change in flight pattern which for the first time in 1958 brought government aircraft directly over the subject property, and the introduction of night flying, do present a series of events the cumulative effect of which constituted a "taking" no earlier than the beginning of 1958.

Clearly the evidence introduced by the government, upon whom lay the affirmative burden of proving the precise date of "taking", was insufficient to support the conclusion reached by the Court below.

Clearly the test applied by the Court was distorted by its attempt to fit the unsupported theories presented by Respondent into the concepts defined and fashioned by *Dickinson, Bacon, Klein, Davis* and *Jensen,* supra.

The Court's determination that Petitioners' cause of action was time barred ignores the precepts of the cited authorities, ascribes grandiose importance and significance to a federal statute designed merely to aid the Courts and not to punish litigants or deprive them of Constitutionally protected rights, and conflicts directly with the state of established law. If permitted to stand it would constitute a great departure from the principles so carefully considered and set forth heretofore.

B. The Decision Below Improperly Deprives Petitioners Of A Constitutional Right And Is Based Upon The Improper Application Of A Federal Statute.

This Court recognized in *United States v. Causby,* supra, the Constitutional right of a property owner to just compensation for the taking of an avigation easement over such property by the federal government. 328 U. S. at 266-267.

The federal statute here under consideration, 28 U. S. C. §2501, did not create such right, but merely added the "procedural niceties" of due process which were not contained in the Fifth Amendment of the Constitution. *United States v. Dickinson,* supra at 748. The Act is a procedural device to prevent the presentation of stale claims, "where the facts were not clear by reason of the passage of time". *Gordon v. United States,* supra at 265. In this respect, it is a perfectly proper subject of affirmative proof by the defendant in an appropriate case.

In this case Respondent left the "taking" to physical events thereby casting upon Petitioners the burden of de-

termining the precise moment at which their rights accrued. See: *Dickinson*, supra.

The Court below has now seen fit to absolve the Respondent from liability by reason of its conceded unconstitutional taking of Petitioners' property by not only failing to apply the tests sanctioned by this Court and previously applied in other cases by the Court below, but by, moreover, failing to require the Respondent to bear the burden of persuasion with respect to the time of the accrual of the action.

To permit such a result to stand would not only work a manifest injustice to the Petitioners, but would cast an improper and unwarranted burden upon future claimants. It is, therefore, important that the inter-relationship between 28 U. S. C. §2501 and Fifth Amendment rights be clarified, and that a definitive statement respecting the burden of proof of the government in cases in which an unconstitutional "taking" has been conceded be made.

CONCLUSION.

The test applied by the Court below in determining the time at which a concededly unconstitutional "taking" of Petitioners' property occurred was erroneous and in direct conflict with prior decisions of this Court, courts of concurrent jurisdiction, and of such Court itself.

The Court below failed to consider the question of whether or not an additional surcharge or "taking", for which an action was not barred, had occurred and in so doing abdicated its right and duty to draw proper legal conclusions from the facts found by the Trial Commissioner.

The decision below is based upon the imposition of an improper burden upon Petitioners and an improper application of a federal statute. Since such statute must be ap-

plied to claims dealing with Fifth Amendment rights it is imperative that a definitive statement respecting the purpose of the Act and its relationship to Constitutional rights be made.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

IN THE
UNITED STATES COURT OF CLAIMS

No. 346-63.

(Decided May 12, 1967)

COE A. BOARDMAN AND MARTHA E., HIS WIFE, AND FRANK J. SMITH AND THERESE E., HIS WIFE

v.

THE UNITED STATES.

Before: COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, Judges.

OPINION.

PER CURIAM: This case was referred to Trial Commissioner C. Murray Bernhardt with directions to make findings of fact and recommendation for conclusions of law. The commissioner has done so in a report and opinion filed on July 13, 1966. Exceptions to the commissioner's findings

and recommendation for conclusion of law were filed by plaintiffs and the case was submitted to the court on the briefs of the parties and oral argument of counsel. Since the court is in agreement with the opinion, findings and recommendation of the commissioner, with modifications, it hereby adopts the same, as modified, as the basis for its judgment in this case, as hereinafter set forth. Plaintiffs are therefore, not entitled to recover and their petition is dismissed.

Commissioner Bernhardt's opinion,* as modified by the Court, is as follows:

Ever since a measure of governmental liability was found by the Supreme Court in the landmark case of *United States v. Causby*, 328 U. S. 256 (1946) for the taking of private property rights by regular aircraft overflights,—a wrong theretofore esteemed by many to be a noncompensable trespass,—lower courts coping with the spate of suits inspired by the *Causby* example have encountered recurring difficulty in fixing the accrual date of each cause of action. That is the problem here, and the petition stumbles on our six-year statute of limitations. 28 U. S. C. §2501. The plaintiffs' theory of placing the taking date to coincide with a nearby airplane crash in 1961 which dramatized, but did not create, the risk to residential developments neighboring the airport, is not orthodox; nor does it relieve from the bar of the statute the petition filed here in 1963 to redress flight nuisances commencing in 1955 and fluctuating only mildly in quantity and quality in succeeding years. In effect, the plaintiffs are necessarily saying that in themselves the overflights from 1955 onward did not deprive their property of residential value, but only when in combination with the risk factor which (according to

* The opinion, findings of fact, and recommended conclusion of law are submitted under the order of reference and Rule 57(a).

them) did not emerge until accentuated by the 1961 crash, even though equivalent risks had been latent for as long as planes had flown the local skies.

In June 1955 the plaintiffs, both of them experienced real estate developers and builders, bought 122.32 acres of forested land fringing the northern boundary of the Willow Grove Naval Air Station at Willow Grove, Pennsylvania. The air station, opened in 1943, became in postwar years, and still is, a flight training center for reservists of the Navy, Marines, and Air Force, as well as the Air National Guard. Until July 1955 only propeller-driven aircraft, mostly single-engine fighter types, were assigned to the station, with the exception of a period starting in 1950 when a few twin-engine jet fighters capable of negotiating the relatively short runways were temporarily in operation. A 4,000-foot extension to the north end of the main northwest-southeast runway was built and became operational in July 1955 to permit jet fighter operations, and immediately a number of single-engine F-9 and T-33 jet fighter planes were transferred to the station and an active program was launched to convert reserve pilots of conventional planes into jet pilots. Then and later most of the flight activity at the base involved jet fighter aircraft, primarily during the warmer months on weekends (hence the soubriquet, "weekend warriors") and during annual fortnightly training periods, all of them operating from the extended northwest-southeast runway. Because the plaintiffs' property lay entirely within the approach zone at the northern end of the extended runway, all jet flights taking off to the north or landing to the south on that runway (constituting half or more of all flights due to the prevailing breezes) funneled over the plaintiffs' property at above-ground altitudes ranging from 200 feet to 350-500 feet in taking off across the hither and yonder boundaries, respectively, and from 220 to 303 feet on GCA landings (Ground Control Approach, used under nonvisual weather

conditions). These altitudes varied within 50 feet depending on the particular aircraft, type of mission, atmospheric conditions, pilot technique, etc. Visual landings (VFR; 90 percent of total landings) were at higher than GCA altitudes. Propeller-type aircraft using the northwest-southeast runway both before and after its lengthening landed under visual conditions, and took off, at higher altitudes over the plaintiffs' property than their jet counterparts. Commencing in September 1957 the F-9 jets were gradually replaced with F-1's which, because of their superior power and flight characteristics, departed and arrived visually over the property in question at substantially higher levels than other jet aircraft in use there, and produced more noise, but not enough to surcharge the existing easement of flight insofar as the plaintiffs demonstrated. The volume and varieties of flights and aircraft prior to December 1957 (the date six years prior to suit) were not substantially different from those thereafter from the standpoint of increasing the interference with use of plaintiffs' land. At no time prior to at least 1963 were there employed at the station any supersonic jets or ones equipped with afterburners.

The defendant correctly and understandably concedes that these flight activities invaded the plaintiffs' property rights in the "superadjacent airspace", for any residential potential in the land was seriously impaired by the nerve-jangling noise, vibration, and sight of the low-flying planes. Witness graphic proof of this in the written complaint made in January 1957 by the operator of a children's summer day camp to the commandant of the air station. In July and August of each year from 1956 through 1961 the Silver Arrow Day Camp was conducted for young children on a 21.55-acre piece of the plaintiffs' original tract which they had sold in May 1956. The small tract, containing an old mansion and miscellaneous farm structures, abutted the northern boundary of the base, and was directly in line

with the offending northwest-southeast runway. The camp operator's complaint, based upon flights in the summer of 1956, described the location of the camp in direct line with the runway, expressed fear for the safety of the children from planes flying with a "deafening roar" at "extremely low altitudes * * * directly over the camp.", referred to the children as having been "'frightened to tears" from the perilous proximity of the passing planes, and requested measures to reduce the hazard. The camp operated only during weekdays, when the flight activities ebbed sharply from the heightened weekend traffic, so we may surmise how much more distressing the situation would have been on weekends to permanent residents beneath, had there been any. The complaint was investigated by the air station, but no corrective action consistent with discharge of the Navy mission was deemed possible. If early conditions were so objectionable as to evoke such a complaint, knowledge of them must be imputed to the plaintiffs who could then or at any time prior to the lapse of six years in July 1961 or thereabouts have instituted the present action, rather than delaying the filing of this now time-barred suit until December 1963, as they did.

The plaintiffs purchased the property for the purpose of subdividing and building homes for sale. In mid-1955 they approached both the Federal Housing Administration and the local planning commission in order to obtain the benefits of the FHA loan insurance program in the one case, and to receive tentative approval of a preliminary development plan in the other. In explanation of its refusal the FHA remarked the proximity of the property to the overhead air traffic, and cited its 1954 policy which prohibited loan insurance coverage to properties adjacent to airports. This, of course, would not preclude private financing, if available, but FHA coverage is highly desirable in the marketing of new homes. It may be true as the plaintiffs have averred

that they were unaware of the extent and nature of the overflights until 1960, or that they did not know in 1955 that the runway channeling planes over their property had been extended so as to aggravate the problem, but the flight facts were readily apparent to anyone who took the trouble to see or to inquire, and the plaintiffs' professed ignorance of them was their own fault, as was their failure to learn prior to purchasing the property the readily ascertainable facts concerning expansion of the air station's program.

The preliminary development plan which the plaintiffs had presented informally to the local planning commission in 1955 was returned for certain corrections. In 1960 the plaintiffs revived their interest in developing the property and submitted revised development plans to the planning commission, altering them again in early 1961 to meet zoning requirements, only to have them rejected because of the risk entailed in locating a high density residential development in an approach zone of a major runway. The plaintiffs attribute the adverse action of the planning commission to the August 27, 1961 crash of an aircraft into a large store hard by the station, which they urge brought home the hazards of living close to an airport. This, the plaintiffs contend, coupled with seven years of persistent jet flight operations, accrued their cause of action by a process of culmination, for it emphasized and advertised the risk feature with the result of making their property unmarketable for its intended use. This oversimplifies the actuality. The plaintiffs voluntarily elected to postpone reapplying to the planning commission until 1960 for reasons best known to themselves. Had they pursued their initial application in 1955 there is no reason to believe that the planning commission would have ignored the well-known facts of the disadvantageous property location in relation to flight activity, or would have been any more willing to sanction a high density subdivision in 1955 than in 1961. The plaintiffs

overemphasize the effect of the 1961 crash on the commission's action, whereas the reason given by the commission for refusing approval in 1961 would have been equally applicable to 1955, and no doubt as conclusive. The 1961 decision of the commission was not "tacit acknowledgment" that until the crash the public would purchase homes in the development. Since then the plaintiffs have abandoned their plans and the property remains on their hands, useless and unused.

The contention that the cause of action accrued with the crash of August 1961 because it established a risk factor which was theretofore unappreciated is, moreover, vitiated by the record that in the 17 years preceding that incident there had been 17 airplane crashes on or in the vicinity of the same airstation, not to mention four additional crashes in the two following years. With this busy fatality record it is idle for the plaintiffs to single out one of many such accidents as the sudden cause of public recognition that the property in suit was unsuitable for homesites from a risk standpoint alone, independent of other harassing features of living in an approach zone which the plaintiffs have purposely underplayed to avoid the limitation defense. If it could not be judicially noticed that hazards would attend living in a development on the plaintiffs' land bordering the airport, the prevalence of accidents in the area over the years would remove any doubts. Furthermore, whereas the degree of interference with a livable environment at the end of a runway might well vary with the type of aircraft, their altitude, number, noise, and general nuisance, there is no reason to believe that the risk inherent in overhead flights varies or is governed by these criteria. The crash of a tiny pleasure plane into a home might be as disastrous to its occupants and as likely but unpredictable in its occurrence as that of a more sophisticated and deadly military aircraft.

It is not seen how the precedents on which the plaintiffs principally rely aid them. *Jensen v. United States,* 158 Ct. Cl. 333, 305 F. 2d 444 (1962); *United States v. 3276.21 Acres of Land,* 222 F. Supp. 887 (1963); *Bacon v. United States,* 155 Ct. Cl. 441, 295 F. 2d 936 (1961). All three support the now common view that where the nature and degree of the disturbance to private property rights in approach zones below the line of flight is substantially worsened and rendered intolerable by the use of aircraft which, because of their size, power, noise, altitude and flight characteristics, or because of structural changes in the airport layout, impose a greater degree of interference in the enjoyment of property over which they pass en route to or from their operating runways than the conditions which previously inhered, a significant depreciation in the market value of the property as a direct result of the overflights is not only prerequisite to recovery of just compensation but also marks the date of taking from which applicable statutes of limitation commence to run and valuations for damage purposes are to be measured. This may or may not coincide with the advent of the equipment creating the surcharge, according to the time of total impact in numbers and types of aircraft, frequency and altitude of flights, noise, danger, and other incidents which impair the normal enjoyment of property and hence its market value. Risk of crashes is but one of many elements to consider and, standing alone, has not yet been held to trigger a taking of property in the Constitutional sense or to amount to more than a trespass. It is true that in the *Bacon* case, *supra,* a fortuitous crash near the home of one plaintiff happened to coincide chronologically with the culminating effect of a new breed of jet aircraft (the F-84f) which, because of their number, flight frequency, and significantly different operating characteristics were more disruptive to dwellers in the approach zone below their repeated passage than the types of aircraft

which they displaced or augmented, and thus effected not only a taking but also caused the withdrawal of previously available FHA, VA, and conventional financing forms so indispensable to marketability.

We cannot say with any confidence at what precise point after the first arrival of jets at Willow Grove in July 1955 they reached the level of substantial interference, but it is clear that it was reached at least by the summer of 1956 when conditions prompted the convincing complaint by the proprietor of the Silver Arrow Day Camp, referred to above. There is minor conflict in the testimony on the score of low and frequent flights, but it is inconceivable that those witnesses of the plaintiffs who were on the property and saw few or no aircraft skirting the treetops during periods of prime activity could have been so oblivious of conditions which affected the day camp so profoundly. The belying flight statistics, sketchy as they are in breakdown, raise the question of the credibility of those who were there and profess to have seen or heard nothing untoward.

The differences between the present case and those cited by the plaintiffs are obvious. A long record of aircraft accidents antedating the 1961 crash by 17 years established, unlike the *Bacon* case, that a serious potential risk not only existed but had materialized and was known throughout the Willow Grove area, so that the 1961 crash, no matter how well-publicized it may have been, was only anticlimactic to the clear warnings which past events had supplied so abundantly. Further, the withdrawal of FHA and VA loan guarantee protection in the *Bacon* case was contemporaneous with the crash and the actionable peak of the overflight burden, whereas in the present case the FHA had precluded plaintiffs from its program in 1955, the overflights became onerous no later than the summer of 1956, and the suit was filed seven years later. The refusal of the planning commission to approve the plaintiffs' development

plan in 1961, discussed earlier, may evidence the cause of plaintiffs' loss, but does not mark its inception. It could not be argued that because the planning commission rejected the plaintiffs' proposal in 1961 that the plaintiffs were forgivably blind to the reasons in existence for the preceding six years, or could not have taken appropriate action more seasonably. The planning commission did not withhold its rejection waiting for the overflights to become intolerable or for a plane to crash; it was merely not called upon to pass judgment until the plaintiffs applied. A clear line must be drawn between cause and effect.

The record contains voluminous data on valuation for the determination of damages, but it is not reflected herein because the plaintiffs have failed to establish the existence of liability and the petition should be dismissed.

IN THE UNITED STATES COURT OF CLAIMS.

* * * * * * * * *

346-63 COE A. BOARDMAN, ET AL.

v.

THE UNITED STATES.

* * * * * * * * *

Before COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, Judges, except that REED, Justice (Ret.), sitting by designation, participated in App, 6-65 in place of DAVIS, Judge.

ORDER.

These cases come before the court on motions for reconsideration, order vacating dismissal, rehearing, relief from order, and for further relief under Rules 68 and 69 of the Rules of this court, and on consideration thereof,

IT IS ORDERED this 13th day of October 1967, that said motions be and the same are denied as follows:

* * * * * * * * *

346-63 Coe A. Boardman, et al. Plaintiffs' motion for rehearing.

* * * * * * * * *

BY THE COURT,

/s/ WILSON COWEN,
Chief Judge.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1007

COE A. BOARDMAN AND MARTHA BOARDMAN, HIS WIFE, AND FRANK J. SMITH AND THERESE E. SMITH, HIS WIFE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims is reported at 376 F.2d 895 (Pet. App. 24–33).[1] The findings of fact of the Trial Commissioner, adopted by the Court of Claims, are printed as an appendix to this brief, *infra*, pp. 9–19.

JURISDICTION

The judgment of the Court of Claims was entered on May 12, 1967. A timely petition for rehearing was

[1] "Pet. App." refers to the Court of Claims opinion printed in the appendix to the petition. "App." refers to the Commissioner's findings, adopted by the court and printed as an appendix to this brief.

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denied October 13, 1967 (Pet. App. 34). The petition for a writ of certiorari was filed January 10, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether the Court of Claims correctly held that petitioners' suit for compensation for the taking of an avigation easement over their property was barred by the statute of limitations, 28 U.S.C. 2501, because there had been substantial sustained interference with the use and enjoyment of their property by low and frequent overflights of aircraft more than six years before institution of the suit.

STATEMENT

Petitioners, who are real estate developers, bought 122.32 acres of wooded land across a road from the northwest boundary of the Willow Grove Naval Air Station at Willow Grove, Pennsylvania, in June 1955. Activity at the Air Station was at that time in the process of being expanded. In the following month, July 1955, a 4,000-foot extension to the northwest end of the main runway became operational for jet aircraft (Pet. App. 26–27; App. 9).

The end of this extended runway is about 2,500 feet from the near edge of petitioners' land. A projection of the runway would cross petitioners' tract which also lies entirely within the approach zone to the runway. Planes taking off and landing fly through that portion of the approach zone at low altitudes (Pet. App. 26–27; App. 10).

Prior to July 1955, nearly all the flights at the airfield had been by propeller-driven aircraft.[2] Immediately after extension of the runway, a number of single-engine F–9 and T–33 jet fighter planes were transferred to the Station in an active program to convert reserve pilots of conventional planes into jet pilots. This conversion involved more intensive use of the airfield. Commencing in September 1957, the F–9 jets were gradually replaced by more powerful F–1 jets (Pet. App. 26–27).

Petitioners instituted this suit on December 5, 1963, to recover $300,000 representing claimed depreciation in the market value of their land caused by the overflights. The Court of Claims sustained the government's contention that the action was barred by the six-year jurisdictional time limitation contained in 28 U.S.C. 2501 (Pet. App. 25; App. 9, 19). Under that statute, the present suit is not available for claims that accrued prior to December 5, 1957.

The Court of Claims found that the jet overflights reached the level of substantial interference at least by the summer of 1956 (Pet. App. 32). The evidence showed that, relative to that summer, the owner of a summer day camp for children, operated on a 21.55-acre piece of petitioners' original tract which they had sold in May 1956, complained to the Navy of "the deafening roar * * * at extremely low altitudes * * * directly over the camp" and referred to the children

[2] The Air Station has been in operation since 1943. After World War II, it has been used as a flight training center for reservists of the Navy, Marines, and Air Force and the Air National Guard (Pet. App. 26).

as having been "frightened to tears" (Pt. App. 27–28; App. 14–15). Since the camp operated only during weekdays and the principal flight activity was on weekends, it appeared obvious to the court that the situation was even more distressing on weekends (Pet. App. 28).

In the summer of 1955, petitioners applied to the Federal Housing Administration for approval of a preliminary development plan in order to obtain the benefits of the FHA loan insurance program. The approval was refused because of an FHA policy, adopted in 1954, which prohibited loan insurance coverage to properties adjacent to airports (Pet. App. 28; App. 17–18). Similarly, in the summer of 1955, petitioners submitted their preliminary development plan to the local planning commission which returned it for certain corrections. Petitioners' plan remained inactive until 1960 when they resubmitted it, with a subsequent alteration early in 1961 to meet new zoning requirements. But the planning commission advised the county supervisors that it was not in favor of developing the property for high density residential use due to the risk involved from its location in the approach zone of the most active runway at the Air Station (Pet. App. 29; App. 18).

The court rejected petitioners' contention that their cause of action accrued on August 27, 1961, by a process of culmination brought about by the dramatic effect of the crash of an aircraft on that date, coupled with seven years of jet flight operations (Pet. App. 29). That crash was about 2½ miles southeast of petitioners' property

and off the airfield (App. 17). There had been 17 airplane crashes on or in the vicinty of the Air Station in the 17 years before August 1961 (and four since). The court concluded that there is no basis for singling out one of the many such accidents as the sudden cause of public recognition that this property in the approach zone was unsuitable for homesites (Pet. App. 30).

ARGUMENT

Flights of aircraft over private land constitute a taking where they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land. *United States* v. *Causby*, 328 U.S. 256, 265. The approach it has taken in applying that test has been expressed by the Court of Claims in *Jensen* v. *United States*, 158 C. Cls. 333, 305 F. 2d 444, 447, as follows:

> Some annoyance must be borne without compensation * * *. The point when that stage is passed depends on a particularized judgment evaluating such factors as the frequency and level of the flights; the type of planes; the accompanying effects, such as noise or falling objects; the uses of the property; the effect on values; the reasonable reactions of the humans below; and the impact upon animals and vegetable life. * * *

On the basis of this well-established approach, the court found that the "taking" in the present case had occurred no later than the summer of 1956. That conclu-

sion has strong support in the evidence, and there is nothing that compels a contrary conclusion.[3]

The ruling presents no conflict with any decision of this Court or of any other court. The Court of Claims decisions recited by petitioners (Pet. 8, 14–15) merely reached a different result from different combinations of the above-recited factors. They represent differing applications of a rule that has been developed by the Court of Claims case-by-case in applying *Causby*.

The concept of a "gradual" or "incipient" taking sought to be invoked from the flooding situation in *United States* v. *Dickinson*, 331 U.S. 745, even if it were applicable to overflights of aircraft, is not available here, because a very substantial and sustained interference with the enjoyment and use of petition-

[3] The change in flight pattern from a left turn to a right turn, referred to by petitioners as having occurred in 1958 (Pet. 4, 14), occurred in 1957 (App. 11). The change apparently pertained only to properties beyond petitioners' land (see Pet. App. 27). Because petitioners' tract lay entirely within the approach zone (Pet. App. 26), under either pattern the planes flew directly over petitioners' property at low altitude. Similarly, the introduction of F–1 jets, referred to by petitioners as having occurred in 1959 (Pet. 14), occurred in September 1957 (Pet. App. 27; App. 10–11). These jets cleared petitioners' property at higher elevations than the F–9's which they replaced (App. 11).

The mere fact of the rejection of petitioners' subdivision plan in 1961 does not establish the effect of the 1961 crash on that rejection. The court noted that petitioners voluntarily elected to postpone reapplying to the planning commission until 1960. The same reasons for disapproving a high-density residential subdivision in the approach zone existed in 1955 as in 1961, and there is no reason to believe that the commission would have ignored these reasons in 1955 if petitioners had pursued their initial application at that time (Pet. App. 29–30).

ers' land from flights by jet aircraft had occurred and stabilized at least by the summer of 1956.

Moreover, the *Dickinson* principle is not applicable. That decision dealt with rising waters impounded by a dam. The rise was by planned "successive stages" (331 U.S. at 746). The Court merely held that the landowner could await the completion of those planned stages, to ascertain the extent of the damage, before bringing an action. Here, there is no comparable stabilized period to await. What was taken here was established when airplanes interfered with petitioners' use and enjoyment of their property by commencing to fly over it frequently and at low altitudes. It was obvious from the location of the runway, or readily ascertainable from the Navy, that flights would continue for an indefinite time and in fluctuating numbers at the will of the government.

There were no planned "successive stages" or "continuing process of physical events" (331 U.S. at 749) as to altitudes or numbers comparable to rising waters behind a completed dam which would inevitably stabilize within a certain time. It is unlikely that the operation of a military air base would ever become stabilized in the sense apparently intended by petitioners. To apply *Dickinson* to the flight of planes at an airfield in the manner sought by petitioners would virtually make 28 U.S.C. 2501 inapplicable to airfields.[4]

[4] If the Government should abandon an air base, after intensive low overflights over a period of several years, it is doubtful that landowners who had suffered economic loss would acquiesce in a concept that the situation has now "stabilized" so that no compensation is owing. Additional problems as to prematurity under petitioners' theory would be presented in intermediate factual situations.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1968.

APPENDIX

FINDINGS OF FACT

1. This action was filed on December 5, 1963, to recover $300,000, representing the claimed depreciation in market value of a parcel of land located in Horsham Township, Montgomery County, Pennsylvania, allegedly caused by low and frequent flights of military jet aircraft while operating from the Willow Grove Naval Air Station at Willow Grove, Pennsylvania. The property, consisting of 100.77 acres of vacant land, is located in the approach zone to the northwest end of the northwest-southeast runway of the air station at distances from the end of the runway ranging from approximately 2,500 feet to 6,000 feet. The property is bounded on the north by Park Road and partially on the south by Keith Valley Road, which is the northern boundary of the air station.

2. The Willow Grove Naval Air Station was established as a flying field during World War II and has been in continuous operation as such since then. Originally, it had an east-west runway and a northwest-southeast runway. By July 1955, a 4,000-foot extension to the northwest end of the northwest-southeast runway became operational for jet aircraft. It was completed in October 1955.

3. The air station is used as a training field for pilots in the Reserves of the Navy, Marines, and Air Force, and for the Air National Guard. The 512th Wing of the Air Force Reserves was assigned to the station in August 1958. The 111th Group of the Air

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National Guard commenced to operate from the station in the spring of 1963.

4. With one exception, the aircraft assigned to the air station prior to July 1955 were single-engine and multi-engine propeller-driven types. The exception was that for a period starting in 1950 a Phantom 1 twin-engine fighter jet operated there, and was capable of taking off and landing on the runway prior to its extension in 1955. Some propeller-driven aircraft are still operating from the air station.

5. Prior to the 4,000-foot extension to the northwest-southeast runway in 1955, all aircraft approaching the air station for landing on the northwest end of the runway under the Ground Control Approach system (GCA)[1] flew over the plaintiffs' property at altitudes above ground level ranging from 462 feet to 479 feet, with a possible lower variance of 50 feet, depending on atmospheric conditions, type of aircraft, and pilot performance. Following the extension of the runway in 1955 the height of aircraft over plaintiffs' property in the course of GCA landings varied from 220 to 303 feet above ground level, still with a 50-foot margin of error. These calculations take into consideration the sloping elevation of plaintiffs' property from its north to south boundaries. Approximately 10 percent of all landings were GCA; the rest were visual (VFR).

6. None of the jet aircraft which operated from the air station to 1963 were supersonic or were equipped with afterburners. The first jet aircraft to operate there following the extension of the northwest-southeast runway in July 1955 were F–9 and T–33 single-engine jets. The F–9's remained there until June 1958,

[1] A 3-degree angle. GCA landings were made under adverse weather conditions.

being gradually replaced with F–1's starting in September 1957. The T–33's are still operating.

7. On takeoffs to the northwest the F–9 would enter the southern boundary of plaintiffs' property at approximately 200 feet above ground level and would exit the northern boundary at 350 to 500 feet above ground level. The F–1, which had a more powerful engine than the F–9 and was somewhat more noisy, had superior flight characteristics and would clear the plaintiffs' property at higher elevations than the F–9. In takeoff characteristics the T–33 was somewhere midway in performance between the F–1 and the F–9. The aircraft gained altitude more rapidly in cold weather than in warm weather. The height statistics would vary within 50 feet of the given altitudes, depending on the type of mission and the experience of the pilot. The aircraft would not commence their turns from the center line of the runway extended until they were 1,000 feet above ground level, which placed them beyond the northern boundary of plaintiffs' property at that time. In GCA landings all three of these jet aircraft would follow the prescribed glide angle, but on visual landings the F–9 would cross the plaintiffs' property at a lower elevation than the F–1. In 1957 the traffic pattern for visual landings was changed by shifting the downwind leg of the circular visual pattern from the east side of the runway to the west side in order to avoid overflights over certain residential areas, churches and schools.

8. The number of jet aircraft assigned to the air station from 1955 through 1963 varied from two in June 1955 to a high of 48 in March 1958. At selected dates they varied in number and types as follows:

	F-9	F-1	T-33	Total
December 1955	31		3	34
August 1956	32		5	37
December 1957	32	9	4	45
March 1958	31	13	4	48
March 1959		36	7	43
December 1959		18	4	22
September 1961		15	2	17
December 1963		18	3	21

The jet inventory commenced to decrease in December 1959, and thereafter until the end of 1963 reached a high of 30 aircraft (June 1963) and a low of 17 (June, September and December 1961). The reduction in jet inventory was due to the training of Reserve pilots in propeller-driven aircraft for antisubmarine warfare, rather than in jets. The propeller-driven aircraft used for antisubmarine training crossed the plaintiffs' property at higher altitudes than the jets while taking off to the northwest.

9. Jet operations commenced at the air station in 1955 with nine jet fighter squadrons of selected Navy and Marine Reserves (so-called "weekend warriors" because their flights were concentrated on weekends). Each squadron had 24 pilots who, from July 1955 to 1957, underwent extensive transitional training from propeller-driven aircraft to jet aircraft. Six officers were assigned to train them. In training the officers would "chase" the trainees in a separate aircraft, exercising control by voice communication over the radio. After qualifying for flying jet aircraft the trainees would fly alone, mostly on weekends.

10. From July 1955, when the extended northwest-southeast runway became operational, until the end of 1955, a total of 31,315 takeoffs and landings were executed at the air station. Comparable statistics for succeeding years are as follows:

1956—44,923 (excluding one month when the runway was being resurfaced and was not used)
1957—21,777 (nine months only)
1958—18,857 (six months only)
1959—48,737
1960—46,762
1961—42,256
1962—49,954
1963—52,116

Most of the foregoing takeoffs and landings were by jet aircraft, and about half of the takeoffs, because the prevailing winds are from the northwest, were to the northwest and over plaintiffs' property. The plaintiffs contend that, until 1960, they did not have actual knowledge of the habitual flights of aircraft over their property. At that time they offered to sell air rights over the property to the Navy, without results.

11. The 100.77 acres involved in this action are part of the plaintiffs' original purchase on June 13, 1955, of 122.32 acres. They acquired it for the purpose of subdividing and building homes for sale. From November 1956 to August 1957 the plaintiffs removed large trees from the property in preparation to develop it. In the meantime, on May 8, 1956, they sold 21.55 acres of the property fronting on Keith Valley Road (the southern boundary) to a Mr. Shore. This 21.55 acres, which contained an old mansion and some farm buildings, was converted into a children's summer day camp, known as the Silver Arrow Day Camp, which operated from Monday through Friday in July and August of each year.

12. In the summer of 1956 the Silver Arrow Day Camp was operated on the 21.55 acres of the property under the counsellorship of one Leonard Barmat, who operated the same camp under a lease during the suc-

ceeding summers of 1957 to 1961. Mr. Barmat customarily spent each weekend at the camp to prepare activities for the ensuing week. Appearing as a witness for the defendant, Mr. Barmat testified that during the weekdays there were at least 15 flights by jet aircraft each day at low altitudes over the camp property, and that jet activity on weekends was extremely heavy. By the following letter of January 17, 1957, to the commandant of the air station, Mr. Barmat complained of the frequency and low altitudes of the jet flights over the camp property and requested that the operations be shifted to another runway because of the risk and disturbance:

> May I call your attention to the fact that I am the operator of a children's day camp, which houses 150 children, operates during the months of July and August, and is situated less than a half-mile from the Willow Grove Naval Air Station. The camp is named Silver Arrow Day Camp at Keith Valley Road between County Line and Davis Grove Road. A most dangerous situation exists in that one of your runways for jet plane takeoffs and landings is directly in line with our camp.
>
> We are very much concerned as to the safety of our children with your aircraft flying at extremely low altitudes and directly over the camp.
>
> We do not have to elaborate on the deafening roar of the jet planes when they are only a hundred feet overhead. Neither do we have to stress the extreme danger involved with the planes taking off and landing directly above our children. We are greatly alarmed about this precarious situation. Last summer, many of our children were frightened to tears because of the closeness of the jet aircraft.
>
> We hope that in bringing this perilous condition to your attention, you can take the necessary precautionary safety measures during the

two month period when our camp is in session, to safeguard the health of our children. We do not want to greatly curtail the aerial activity at the Naval Air Station, but feel that one important safety measure would be for the flights to originate and end from another runway—one not directly in the path of the children. There are probably many other safety measures which you can enforce to further insure our camp's safety.

We are only interested in these extra-precautionary steps being enforced during the hours when our children are at camp—from 9 a.m. to 4 p.m., Mondays through Fridays, during July and August only. Our children return home daily at 4 p.m. and are not at camp on Saturdays and Sundays, nor during the other 10 months of the year.

We have a tremendous responsibility and obligation to the parents for the complete safety of their children while they are at camp. We hope you can clearly understand our position, and thereby take the proper measures to rectify this hazardous predicament.

I would appreciate hearing from you relative to this matter.

13. The following reply was addressed to Mr. Barmat by the commandant of the air station on February 21, 1957:

This is to acknowledge receipt of your letter of 17 January regarding annoyance by aircraft from Naval Air Station, Willow Grove.

I am sure you realize that due to the proximity of your camp to this station a certain amount of disturbance from aircraft operation is inevitable. At the outset, I wish to assure that it is our sincere desire to conduct flight operations in such a manner as to minimize annoyance by our aircraft to the local residents, but, at the same time, conduct such operations to insure maximum safety of flight.

Considering that reserve aviators must maintain their combat readiness in order to fulfill the national defense mission assigned to the Naval Air Reserve, and the fact that propeller type aircraft could not longer be effectively used for this purpose, a transition to jet aircraft was commenced at this activity in June of 1955. Accordingly, a single runway, running from northwest to southeast was lengthened to approximately eight thousand (8,000) feet and it is the sole runway which can adequately handle jet aircraft. Since the Silver Arrow Day Camp is located approximately three thousand (3,000) feet from the northwest extremity of the runway, it is conceivable that under certain wind and atmospheric conditions, it is in the line of flight of aircraft landing on runway 15 or taking off from runway 33. In either case, the area is not congested and it is considered that an emergency could be negotiated without endangering the children.

It is my policy to treat each complaint individually in the hope that prompt adjustment will alleviate the problem. However, any alteration to operational procedure is made with safety as the primary consideration, and in a case such as this, a turn-away in the initial phase of a take off run would not only endanger the pilot but the community as well.

Flying at this activity is largely done by Naval Reserve aviators who, due to their civilian occupations must maintain their readiness on week-ends, plus one two-week active duty cruise each year. These aviators usually sacrifice their summer vacations for this purpose; therefore, the months of July and August are necessarily the most active. However, since the transition from propeller to jet type aircraft was largely completed in the summer of 1956, which included many take offs and landings, it is anticipated that the annoyance of low flying

jet aircraft will be appreciably reduced this summer.

Please be assured that the Navy is acutely aware of the disturbance caused by military aircraft and is taking every step possible, consistent with the requirements of national defense, to alleviate this disturbance. It is my sincere hope that you, as well as the many others throughout the country, who are being caused discomfort, will find it is possible to bear with us in our efforts toward this end.

14. On August 27, 1961, an F–1 jet, while approaching for a landing at the southeast end of the air station, crashed into a building known as the Bargain City Store located approximately 2½ miles southeast of the plaintiffs' property, causing extensive property damage and personal injuries. In the 17 years prior to the Bargain City Store crash, there had been 17 airplane crashes in, and in the area of, the Willow Grove Naval Air Station. In the two years following the Bargain City Store crash there were four other airplane crashes in, and in the area of, the air station, including one in which the airplane crashed on Keith Valley Road, destroying a building occupied by the Green Valley Day Camp and three automobiles, killing seven persons and injuring 22 others.

15. At the time they purchased the property in suit in June 1955, the plaintiffs had prepared a preliminary plan for its development dated April 18, 1955. In the summer of 1955 coplaintiff Frank Smith informally presented his preliminary development plan to the office of the Federal Housing Administration in Philadelphia, Pennsylvania, and requested a subdivision analysis in order to ascertain whether or not the FHA would insure loans for houses on the property. The FHA appointed an underwriting committee to inspect the property, which concluded and advised

Mr. Smith that the FHA would not insure loans because of the location of the property in the approach zone of the northwest-southeast runway at the air station. This was in accordance with the policy adopted by the FHA in or about 1954.

16. In the summer of 1955 the plaintiffs also submitted their preliminary development plan of April 18, 1955, to the Planning Commission of Horsham Township, for a determination as to whether or not it met the zoning requirements. At that time the Planning Commission felt that there were technical errors in the layout of the streets, as well as a drainage problem that had not been properly met, and directed plaintiffs to rework the plan. Thereafter the plaintiffs' plans to develop the property remained inactive for a few years until 1960, when they sold a lot on the property to one Donald Carson [2] and revived their interest in developing the entire property, engaging an engineer and representatives to rework the plans and resubmit them to the local authorities. The development plan was revised in August 1960, and again in January and February 1961, in order to meet certain zoning changes made subsequent to 1956, requiring larger areas and more frontage feet for lots in the proposed subdivision. The revised plan appeared to meet the Township zoning requirements, but in 1961 the Planning Commission advised the county supervisors in writing that it was not in favor of developing the property for residential use of high density because of the air traffic over it, due to the risk involved in its location in the approach zone of the most active runway at the air station.

17. By reason of the foregoing, since 1961 the plaintiffs have abandoned their plans to develop the

[2] The sale was later canceled and the deposit refunded.

property for residential purposes. It is concluded that (1) the use and enjoyment of the property for residential purposes was seriously interfered with by the single engine jet aircraft which began to operate regularly at the air station in July 1955; (2) there was no greater interference with the use and enjoyment of the property in August 1961 (the alleged date of taking) than at times preceding December 5, 1957 (six years prior to the filing of the petition); and (3) the risk of airplane crashes in the vicinity of the air station which existed in August 1961 was no different in nature or degree than had existed long prior to December 5, 1957.

18. The record contains evidence as to valuation of the plaintiffs' property at relevant times, and the parties have requested findings on valuation based on the record. However, this report will omit such findings because the issue is determinable on liability.

Conclusion of Law

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are not entitled to recover and the petition is dismissed.

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